No. 24-1016

In the Supreme Court of the United States

RISEANDSHINE CORPORATION, DBA RISE BREWING, PETITIONER

v.

PEPSICO, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR

D. JOHN SAUER
Solicitor General
Counsel of Record
BRETT A. SHUMATE
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DANIEL TENNY
BEN LEWIS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a trademark's inherent strength presents a question of fact in a likelihood-of-confusion analysis under 15 U.S.C. 1114.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether a trademark's inherent strength—a factor relevant to the likelihood-of-confusion inquiry in trademark-infringement actions, 15 U.S.C. 1114(1), 1125(a)(1)(A)—is a factual question. The United States Patent and Trademark Office (PTO) registers trademarks, see 15 U.S.C. 1062-1070, and is responsible for disseminating to the public information with respect to trademarks and for advising the President and federal agencies on intellectual-property policy issues, 35 U.S.C. 2. The United States also owns enforceable trademarks (*e.g.*, U.S. Mint®) and may be subject to suit for trademark infringement, 15 U.S.C. 1122(a) and (c). The United States therefore has a substantial interest in the Court's resolution of the question presented. At the Court's invitation, the United States filed a brief at the petition stage of this case.

INTRODUCTION

The central issue in actions alleging infringement of a valid trademark is whether the allegedly infringing conduct "is likely to produce confusion in the minds of consumers about the origin of the goods or services in question." *KP Permanent Make-Up, Inc.* v. *Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004). To guide that inquiry, the courts of appeals have developed various multi-factor tests, all of which treat the "strength" of the senior user's mark as a relevant consideration. Assessment of a mark's strength depends on both its "inherent" (or "conceptual") strength and its "acquired" (or "commercial") strength, which are assessed with the ultimate goal of determining whether consumers perceive the mark as identifying the source of a good or service. The dispute presently before the Court involves inherent strength, which measures the degree to which a mark can identify a good's actual source at the time of the mark's first use.

The Second Circuit has stated that a mark's inherent strength is a "'legal question'" to be decided by a court at summary judgment. Pet. App. 6a (citation omitted). That is incorrect. Where an inquiry "operates from the perspective of an ordinary purchaser or consumer," it is ordinarily treated as a factual question within "the ken of a jury." *Hana Fin., Inc.* v. *Hana Bank*, 574 U.S. 418, 420, 422 (2015). The assessment of a mark's inherent strength involves such an inquiry because inherent strength depends on the consuming public's perception of a mark's source-identifying effect. And in any given case, determining the degree of a mark's inherent strength primarily involves an assessment and weighing of the relevant facts, rather than the clarification or refinement of the governing legal standard. Because the inherent-strength inquiry "involves the application of a legal standard" to the circumstances of particular cases, the inquiry is best viewed as presenting a "'mixed question of law and fact,'" *id.* at 423-424 (citation omitted), in which the factual component predominates.

STATEMENT

A. Legal Background

1. Trademarks

A trademark is a "word, name, symbol, or device" used by a person "to identify and distinguish his or her goods" in commerce and "to indicate the source of the goods." 15 U.S.C. 1127. A trademark's "'primary' function" is "'to identify the origin or ownership of the article to which it is affixed'"—that is, to "identif[y] a product's source" and "distinguish[ ] that source from others." *Jack Daniel's Props., Inc.* v. *VIP Prods. LLC*, 599 U.S. 140, 146 (2023) (citation omitted).

Under common-law principles, the person who first uses a "distinctive mark[]" in commerce to identify his or her goods can acquire certain rights in the mark, including a limited right to "prevent[] others from using" it. *B&B Hardware, Inc.* v. *Hargis Indus., Inc.*, 575 U.S. 138, 142 (2015). The right to exclude allows trademarks to fulfill their essential function of "help[ing] distinguish a particular artisan's goods from those of others." *Ibid.* Consumers who recognize a mark can then rely on it to identify "the goods and services that they wish to purchase, as well as those they want to avoid." *Jack Daniel's*, 599 U.S. at 146 (citation omitted).

Although trademarks are created by state rather than federal law, "Congress has long played a role in protecting them." *B&B Hardware*, 575 U.S. at 142. The current federal trademark scheme dates to the Trademark Act of 1946, ch. 540, 60 Stat. 427 (15 U.S.C. 1051 *et seq*.), popularly known as the Lanham Act. That Act includes two relevant "adjudicative mechanisms to help protect marks." *B&B Hardware*, 575 U.S. at 142. "First, a trademark owner can register its mark with the PTO" to obtain "'important legal rights and benefits'" in connection with its mark. *Ibid*. (citation omitted); see 15 U.S.C. 1051-1072. "Second, a mark owner can bring a suit for infringement in federal court." *B&B Hardware*, 575 U.S. at 142.

2. Registration and distinctiveness

To be registered, a trademark must, *inter alia*, "distinguish[]" "the goods of the applicant * * * from the goods of others." 15 U.S.C. 1052. In other words, it must be "distinctive." *United States Patent & Trademark Office* v. *Booking.com B.V.*, 591 U.S. 549, 553 (2020); see *Wal-Mart Stores, Inc.* v. *Samara Bros.*, 529 U.S. 205, 210-211 (2000); see also 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 11:2, at 965 (5th ed. 2025) (explaining that a mark must be "distinctive" to be a valid trademark).

"[C]ourts have held that a mark can be distinctive in one of two ways." *Wal-Mart*, 529 U.S. at 210. First, a mark will be "inherently distinctive" if its "'intrinsic nature serves to identify a particular source.'" *Ibid*. (citation omitted). Second, a mark—whether inherently distinctive or not—will have "acquired distinctiveness" if it has obtained a "secondary meaning," so that "'in the minds of the public, the [mark's] primary significance * * * is to identify the source of the product rather than the product itself.'" *Id*. at 211 & n.* (citation omitted); see 15 U.S.C. 1052(f) (authorizing registration of a mark that "has become distinctive of the applicant's goods").

Courts classify marks on a spectrum of "increasing distinctiveness": "(1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992); see *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976) (Friendly, J.) (setting out the formulation); 1 McCarthy § 11:2, at 966. A generic mark refers to the "'class' of goods" that encompasses the goods to which the mark is attached "(*e.g.*, 'wine')," and it is ineligible for registration because it is "incapable of 'distinguishing [the mark-owner's] goods from the goods of others.'" *Booking.com*, 591 U.S. at 554, 556 (brackets and citations omitted). A descriptive mark is just that—it is "merely descriptive of a product" (*e.g.*, "creamy" for yogurt). *Two Pesos*, 505 U.S. at 769. Such a mark is "not inherently distinctive," but it may be registered if it has "acquired distinctiveness." *Ibid.*; see 15 U.S.C. 1052(e)(1) and (f).

The last three categories—fanciful, arbitrary, and suggestive marks—"are deemed inherently distinctive and are entitled to protection" without proof of acquired distinctiveness. *Two Pesos*, 505 U.S. at 768-769; see 1 McCarthy §§ 11:5, 11:11, 11:62, at 974, 977, 1126-1127. A suggestive mark—the category of mark involved here—"suggests, but does not directly and immediately describe, some aspect of the" product. 1 McCarthy § 11:62, at 1126-1127. For example, "Tide" does not describe laundry detergent; it evokes an ocean tide to market it. See *Booking.com*, 591 U.S. at 553.[1]

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[1] Fanciful word marks (*e.g.*, Exxon gasoline) use new "words invented solely for their use as trademarks," while arbitrary marks (*e.g.*, Shell gasoline) use existing words "in an unfamiliar way." *Abercrombie & Fitch*, 537 F.2d at 11 n.12.

3. Trademark infringement and trademark strength

a. The Lanham Act supplies federal causes of action for trademark infringement, which require proof that an allegedly infringing use of a mark "is likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. 1114(1) (registered marks), 1125(a)(1)(A) (unregistered marks). The owner of a valid trademark therefore must show that the alleged infringement "is likely to produce confusion in the minds of consumers about the origin of the goods or services in question." *KP Permanent Make-Up, Inc.* v. *Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004).[2]

To assess whether a likelihood of confusion exists in a case involving related goods, the courts of appeals have adopted slightly different multi-factor tests under which relevant factors "are to be weighed and balanced one against the other." 3 McCarthy § 24:30 & n.6, at 907-908 (2026); see *id.* §§ 24:27-24:28, at 905-906. The Second Circuit applies a test first articulated in *Polaroid Corp.* v. *Polarad Electronics Corp.*, 287 F.2d 492, 495 (2d Cir.) (Friendly, J.), cert. denied, 368 U.S. 820 (1961), which considers eight "non-exclusive factors": (1) the "'strength'" of the trademark, (2) the similarity between that mark and the allegedly infringing one, (3) the proximity of the parties' products and of their competitiveness, (4) the likelihood that the prior owner may "'bridge the gap'" in the markets for the products,

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[2] A registered trademark carries a presumption of validity, 15 U.S.C. 1057(b), and ordinarily becomes incontestable after five years of continuous use, 15 U.S.C. 1065. See *Wal-Mart*, 529 U.S. at 209. "[T]he general principles qualifying a mark for registration * * * are for the most part applicable in determining whether an unregistered mark is [a valid mark] entitled to protection" under Section 1125(a)(1)(A)'s cause of action. *Id.* at 210 (citation omitted).

(5) any evidence of actual confusion, (6) the defendant's good faith, (7) the relative quality of the products, and (8) the relevant buyers' sophistication. Pet. App. 20a, 50a (citation omitted). The relevance and overall importance of any particular factor depend on the circumstances of the specific case. See, *e.g.*, Restatement (Third) of Unfair Competition § 21 cmt. a, at 227 (1995) (Third Restatement).

b. Although the specific factors considered in the likelihood-of-confusion analysis vary somewhat from circuit to circuit, all circuits treat the senior mark's "strength" as a relevant consideration. See 1 McCarthy § 11:73, at 1153. Determining the strength of a particular mark does not involve a yes-or-no inquiry but instead requires an assessment of where along a spectrum of strength the mark falls. *Id.* § 11:74, at 1157. An assessment of trademark strength measures the *degree* to which the mark will be "remembered" and "associated in the public mind" with the product's source. *Id.* § 11:73, at 1156 (citation omitted). And because it measures "the degree to which the [mark] is associated by prospective purchasers with a particular source," it bears on "the likelihood that [they] will [also] associate * * * a similar [mark] found on other goods" or services with that source. Third Restatement § 21 cmt. i, at 232-233; see 3 Restatement of Torts § 731(f) & cmt. e, at 600, 602-603 (1938) (First Restatement). "The stronger the mark, the more likely it is that encroachment on it will produce confusion," *First Sav. Bank, F.S.B.* v. *First Bank Sys., Inc.*, 101 F.3d 645, 653 (10th Cir. 1996) (citation omitted), while "the weaker the mark, the less protection it receives," *Florida Int'l Univ. Bd. of Trs.* v. *Florida Nat'l Univ., Inc.*, 830 F.3d 1242, 1256 (11th Cir. 2016) (citation omitted).

A trademark's overall strength depends on both its "conceptual" (or inherent) strength and its "commercial" (or acquired) strength—concepts that represent "separate dimensions of strength" viewed "on a time scale." 1 McCarthy §§ 11:73, 11:80, at 1153, 1170; see Pet. App. 51a (referring to terms as "inherent" and "acquired" strength). Conceptual/inherent strength—the subcomponent of the likelihood-of-confusion analysis that is primarily at issue in this case—reflects "the inherent potential of the term at the time of its first use." 1 McCarthy § 11:73, at 1153. And because "the strength of [a] mark turns on its origin-indicating quality[ ] in the eyes of the purchasing public," when a "suggestive" mark (the category of mark at issue here) is first used in commerce, its conceptual strength may be weak or only moderately strong. *Lang* v. *Retirement Living Publ'g Co.*, 949 F.2d 576, 581 (2d Cir. 1991) (citation and internal quotation marks omitted). That may be true, for example, if there has already been significant "prior use of [the] mark's text in other marks, particularly in the same field of merchandise or service." *Variety Stores, Inc.* v. *Wal-Mart Stores, Inc.*, 888 F.3d 651, 662 (4th Cir. 2018) (citation omitted). In that case, "[c]onsumers are unlikely to associate [the new] mark with a unique source." *Ibid.* (citation omitted); see *Star Indus., Inc.* v. *Bacardi & Co.*, 412 F.3d 373, 385 (2d Cir. 2005), cert. denied, 547 U.S. 1019 (2006).

Commercial/acquired strength evaluates a mark's "actual customer recognition value," developed through the mark's use in commerce, "at the time the mark is asserted in litigation." 1 McCarthy § 11:73, at 1153. Because a mark's overall strength depends on both its inherent and commercial strength, an inherently strong mark may "lack [overall] strength" if it lacks commercial strength. *Id.* § 11:80, at 1174 (citation omitted).

B. Factual And Procedural Background

1. Petitioner RiseandShine Corporation, doing business as Rise Brewing, sells nitro-brewed, canned coffee nationwide. See Pet. App. 3a, 46a-47a. RiseandShine uses "RISE" as a mark for its product and has registered "RISE" as a word and design mark. *Ibid.*[3]

In 2021, RiseandShine filed this district-court action against respondent PepsiCo, Inc., alleging that PepsiCo had infringed its "RISE" mark. See Pet. App. 15a-17a. At the time, PepsiCo was selling a caffeinated, canned energy drink nationwide using the mark "MTN DEW RISE ENERGY," *id.* at 3a, 47a, and PepsiCo allegedly had referred to that product as simply "Mtn Dew RISE" or "RISE," First Am. Compl. 18 (July 26, 2021).

The district court granted RiseandShine's motion for a preliminary injunction, Pet. App. 64a-97a, against PepsiCo's use of its "MTN DEW RISE ENERGY" mark, *id.* at 94a-95a. In its analysis of the strength of RiseandShine's "RISE" mark, *id.* at 80a-84a, the court found the mark to be suggestive and thus "inherently distinctive," *id.* at 82a, and further found that the evidence tilted "slightly" in favor of finding acquired strength, *id.* at 82a-84a. The court determined that RiseandShine had established a likelihood of success on the merits by virtue of the two marks' "degree of similarity,"

[3] RiseandShine has registered "RISE BREWING CO." as a word mark and the RISE BREWING CO. logo as a design mark. Pet. App. 46a. In its registration, the company disclaimed "'BREWING CO.,'" thus making "RISE" "the prominent, distinctive portion of the registered RISE Marks." First Am. Compl. 17 (July 26, 2021).

"the proximity of" the parties' "areas of commerce," and "credible testimony of actual confusion." *Id.* at 91a.

2. The court of appeals vacated the preliminary injunction. Pet. App. 45a-63a. The court concluded that the district court had "erred in its evaluation of what is often the most important factor—the strength of [RiseandShine's] mark—as well as in its finding of similarity in the appearance of the products." *Id.* at 50a.

a. The court of appeals held that the district court had committed "legal error" in its strength-of-mark analysis by "fail[ing] to recognize the inherent weakness of [RiseandShine's] mark." Pet. App. 51a, 55a; see *id.* at 51a-61a. The court explained that a mark's strength "'depends ultimately'" on "its 'origin-indicating' quality[] in the eyes of the purchasing public." *Id.* at 51a (citation omitted). The court agreed with the district court that RiseandShine's mark is suggestive, but it observed that "labeling a mark as 'suggestive' is not the end of the inquiry." *Id.* at 54a.

The court of appeals found the inherent strength of "RISE" to be "at the low end of the spectrum of suggestive marks," Pet. App. 55a, because of "[t]he close associations between the word 'Rise' and coffee" as a class of goods, specifically "[c]offee's capacity to wake one up and lift one's energy, which is what the 'RISE' mark suggests," *id.* at 56a-57a. The court also stated that other companies' "use of the term 'Rise' in the beverage market further underlines the weakness of the mark." *Id.* at 57a. The court explained that, "when [RiseandShine] began to use its mark," numerous companies were already "us[ing] the term 'Rise' in the same way" —"*i.e.*, to allude to increased energy, particularly in the morning hours." *Id.* at 58a.

The court of appeals stated that the district court's failure to identify such inherent weakness was "legal error." Pet. App. 55a. While acknowledging its precedent treating "the classification of a mark [as] a factual matter," the court relied on other decisions in which it had found "an undeniable legal element in the determination of how much strength a given mark commands." *Ibid.* The court stated that "[b]etween descriptive and suggestive marks, there may be some room for difference of opinion; nonetheless, the discretion allowed to a factfinder in finding inherent strength is minimal at best." *Id.* at 55a n.1. The court then concluded that, "[g]iven the inherent weakness of 'Rise' for coffee, the [strength] factor [did] not favor" RiseandShine, *id.* at 59a, because that inherent weakness was not "sufficient-[ly]" offset by evidence of acquired strength, see *id.* at 61a.

b. The court of appeals further held that the district court's "finding of similarity in the appearance of the products" constituted "clear error." Pet. App. 50a, 61a; see *id.* at 61a-63a. The court based that conclusion primarily on its view that "the word 'Rise' in this context is not distinctive," and on a comparison between the designs of the energy-drink cans each company had produced, finding that their "overall appearances" were "very dissimilar." *Id.* at 62a.

3. On remand, the district court granted summary judgment to PepsiCo. Pet. App. 15a-44a. In assessing the inherent strength of RiseandShine's mark, the court viewed the court of appeals' conclusions in the earlier appeal as "binding" in the summary-judgment proceedings. *Id.* at 28a, 32a. The court therefore determined that the prior appellate decision "compel[led] a finding

that * * * ['RISE'] is inherently weak as a matter of law." *Id.* at 29a.

After addressing other factors relevant to the likelihood of consumer confusion, Pet. App. 34a-41a, the district court weighed those factors and concluded at summary judgment that no such likelihood existed. *Id.* at 41a-43a. The court viewed the court of appeals' analysis in the first appeal as requiring it to place significant weight on the strength and similarity factors. See *id.* at 42a. The court thus found that, because RiseandShine's "RISE" mark was weak, it received "only an extremely narrow scope of protection." *Ibid.* (citation omitted). The court ultimately concluded that, because "[t]he remaining * * * factors are insufficient to overcome the weakness of the mark and the Circuit's finding of dissimilarity," PepsiCo was entitled to summary judgment. *Id.* at 43a.

4. The court of appeals affirmed. Pet. App. 1a-14a. The court first rejected RiseandShine's argument that the district court had erred in failing to analyze "inherent strength [as] a question of fact." *Id.* at 6a. The court observed that its decisions had long recognized that evaluating a mark's "degree of strength" has "a considerable component of law." *Ibid.* (citation omitted); see *ibid.* ("Earlier this year, we reiterated in no uncertain terms that 'a mark's inherent strength is a legal question.'") (brackets and citations omitted). The court concluded that it was bound at the summary-judgment stage by "the previous panel's determination that 'RISE' [is], as a matter of law, an inherently weak mark for a coffee product." *Id.* at 7a.

The court of appeals rejected RiseandShine's other contentions. The court rejected the company's argument that it had raised "triable issues of fact regarding the acquired strength of its mark," Pet. App. 8a; see *id.* at 8a-10a; and it found no error in the district court's "treat[ment of] the likelihood of confusion question as a matter of law," *id.* at 10a; see *id.* at 10a-13a. Based on those holdings, and on the prior panel's ruling that the companies' marks are not similar, see *id.* at 12a, the court affirmed the district court's ultimate summary-judgment determination that "there was not a likelihood that consumers would be confused by PepsiCo's use of the term 'Rise,'" *id.* at 11a.

SUMMARY OF ARGUMENT

The Lanham Act "focus[es] on consumer perception," specifically the "meaning" that trademarks convey "to consumers." *United States Patent & Trademark Office* v. *Booking.com B.V.*, 591 U.S. 549, 556 (2020). Where an inquiry "operates from the perspective of an ordinary purchaser or consumer," it is ordinarily treated as a factual question within "the ken of a jury." *Hana Fin., Inc.* v. *Hana Bank*, 574 U.S. 418, 420, 422 (2015). The assessment of a mark's inherent strength involves such an inquiry: Based on the evidence in a case, the factfinder must ascertain the consuming public's perception of a mark's source-identifying effect and ultimately make a "factual judgment" about the degree to which the mark identifies a product's source "to consumers." *Id.* at 425 n.2. Although inherent strength has a legal component, it is best viewed as a mixed question of law and fact for which the factual element predominates. A district court therefore should treat the issue as essentially factual when the court decides at summary judgment whether a reasonable jury could find for the nonmoving party.

A. A mixed question of law and fact is generally adjudicated as a factual question if its resolution entails "primarily * * * factual work." *U.S. Bank N.A., Tr. ex rel. CWCapital Asset Mgmt. LLC* v. *Village at Lakeridge, LLC*, 583 U.S. 387, 396 (2018). That typically is so when the applicable legal standard identifies a set of factors that are to be weighed and balanced based on the evidence in a particular case. One example is trademark "tacking," where a legal standard is applied to the facts to ascertain whether, under "an ordinary consumer's understanding of the impression that a mark conveys," an updated mark conveys the same impression as the original. *Hana Fin.*, 574 U.S. at 422. Assessing a mark's inherent strength involves a similar inquiry.

B. Trademark strength is one factor in a broader inquiry used to determine whether the defendant's use of an allegedly infringing mark is likely to confuse consumers about the source of goods. In this context the term "strength" refers to a trademark's effectiveness in communicating to consumers that goods bearing the mark are associated with a specific source. The stronger a mark is—*i.e.*, the more effectively it identifies a particular source of goods—the more likely it is that a different vendor's use of a similar mark will cause consumer confusion. The "inherent" (or "conceptual") strength of a mark is its strength at the time of its first use.

Inherent strength is determined based on several fact-intensive and mark-specific considerations, including an evaluation of whether the mark is inherently distinctive in context, an examination of whether the mark's strong association with a general class of products may diminish the mark's ability to identify a specific source of goods, and an assessment of the mark's source-identifying effect in light of preexisting marks and similar goods already known to consumers. That inquiry is primarily a factual one. And while inherent strength has a legal component that would properly be conveyed to a jury through instructions—which would define the term and explain its relevance to a proper assessment of the likelihood of consumer confusion—the inherent-strength inquiry ultimately requires a factual judgment about what consumers will perceive a mark to signify.

The fact that inherent strength is a subcomponent of the broader likelihood-of-confusion inquiry only reinforces its predominately factual nature. The ultimate question of likely confusion—also a mixed question that turns on consumer perceptions—is itself properly adjudicated as a predominately factual inquiry.

C. The predominately factual nature of inherent strength does not preclude summary judgment in appropriate cases. Summary judgment is warranted if no *genuine* dispute exists over any *material* fact, *i.e.*, if no reasonable jury could find for the nonmoving party. In Lanham Act suits, inherent strength is simply one component of the strength-of-mark inquiry, which itself is a single factor among several that bear on the ultimate likelihood-of-confusion determination. In particular cases, the evidence in the summary-judgment record may preclude a finding for the nonmoving party on the issue of inherent trademark strength, on the issue of overall trademark strength, or on the ultimate issue of likely consumer confusion.

Whether PepsiCo is entitled to summary judgment in this case, however, lies outside the question presented. That issue should therefore be considered afresh by the courts below on remand.

ARGUMENT

A TRADEMARK'S INHERENT STRENGTH IS PREDOMINATELY A QUESTION OF FACT

The court of appeals erred in concluding that a trademark's "inherent strength" should be resolved at summary judgment as "a question of law." Pet. App. 6a. Inherent strength is a mixed question of law and fact for which the factual aspect predominates.

A. A Question That Entails A Primarily Factual Inquiry Is Treated As A Factual Question At Summary Judgment

1. The adjudication of cases routinely requires the resolution of "three kinds of issues": "purely legal" questions, "purely factual" questions, and "mixed question[s]" involving some "combination of the other two." *U.S. Bank N.A., Tr. ex rel. CWCapital Asset Mgmt. LLC* v. *Village at Lakeridge, LLC*, 583 U.S. 387, 393 (2018). The proper characterization of a particular question has significant adjudicatory consequences. At summary judgment, a district court must decide any relevant legal question that is disputed by the parties, even if the issue is close and reasonable minds could disagree as to its proper resolution. The court may resolve material factual questions "as a matter of law," however, only if no "genuine dispute" exists about them, Fed. R. Civ. P. 56(a), *i.e.*, if no "reasonable jury" could find for the nonmoving party, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). On appeal, absent a contrary statutory directive, legal rulings are "reviewed *de novo*," factual determinations are reviewed "for clear error," and mixed questions are reviewed under one of those two standards. *Monasky* v. *Taglieri*, 589 U.S. 68, 83-84 (2020).

Although an identification of purely legal and purely factual questions is ordinarily straightforward, "[m]ixed questions are not all alike" and can require more analysis. *U.S. Bank*, 583 U.S. at 395-396. The standard for appellate review of "a mixed question" in nonconstitutional contexts depends on "whether answering it entails primarily legal or factual work." *Id.* at 396 & n.4. Where answering a mixed question principally involves "amplifying or elaborating on a broad legal standard," thereby "developing auxiliary legal principles of use in other cases," the question involves "primarily legal" work and "appellate courts should typically review a decision *de novo*." *Id.* at 396. But where answering a mixed question will "immerse courts in case-specific factual issues"—issues that, for instance, can require the court to "weigh evidence"—the question implicates "primarily * * * factual work," and "appellate courts should usually review a decision with deference." *Ibid.* In such circumstances, the ultimate determination is predominately factual because it turns on a "'factual inference'" drawn by "tak[ing] a raft of case-specific * * * facts, consider[ing] them as a whole, [and] balanc[ing] them one against another" under a governing legal standard. *Id.* at 397 (brackets, citation, and footnote omitted).

Those principles directly bear on the question presented here. The question at summary judgment is whether the record reveals a "genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), *i.e.*, whether the summary-judgment "evidence is such that a reasonable jury could return a verdict for the nonmoving party," *Anderson*, 477 U.S. at 248. The more fact-intensive a particular mixed question is, the greater the jury's latitude in resolving it, and the more hesitant a court at summary judgment should be (where factual disputes exist) to conclude that the issue has a single, legally dictated answer.

2. In *Hana Financial, Inc.* v. *Hana Bank*, 574 U.S. 418, 422 (2015), the Court determined that the "[a]pplication of a test that relies upon an ordinary consumer's understanding of the impression that a mark conveys" requires a determination that "falls comfortably within the ken of a jury." The Court held that questions concerning the propriety of trademark "tacking"—which allows a party to use the priority date of its original trademark when seeking protection for a revised version of the mark—are properly submitted to the jury in an infringement suit. See *id.* at 419-420, 422-423. Tacking is appropriate when "two marks * * * 'create the same, continuing commercial impression' so that consumers 'consider both as the same mark.'" *Id.* at 422 (citation omitted). The Court explained that—as it has "long recognized across a variety of doctrinal contexts" —"when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer." *Ibid.*

The Court in *Hana Financial* recognized that "the application of a legal standard" is necessary when applying "the 'legal equivalents' test" to determine whether trademark tacking is appropriate in a particular instance. *Hana Fin.*, 574 U.S. at 423. But it explained that "the application-of-legal-standard-to-fact sort of question, commonly called a mixed question of law and fact, has typically been resolved by juries." *Id.* at 423-424 (citation, ellipsis, and internal quotation marks omitted). The Court concluded that "[t]he 'mixed' analysis that takes place during the tacking inquiry is no different." *Id.* at 424. That inquiry requires a "factual judgment" about "an ordinary consumer's understanding of the impression that a mark conveys," asking whether an updated version of a trademark creates "'the same, continuing commercial impression'" in "'the eyes of a consumer.'" *Id.* at 422, 425 n.2 (citations omitted).

The Court in *Hana Financial* observed that tacking is "like most issues in trademark law" in that it is determined "from the perspective of the ordinary purchaser of [the relevant] goods or services." 574 U.S. at 422 (citation omitted). The Court has similarly emphasized that "the Lanham Act's focus [is] on consumer perception," and that "the relevant meaning of a [mark] is its meaning to consumers." *United States Patent & Trademark Office* v. *Booking.com B.V.*, 591 U.S. 549, 556 (2020). As explained below, the determination of a trademark's inherent strength is no different. It requires an assessment of consumer perception as a predominately factual question and should be treated as such at summary judgment.

B. A Trademark's Inherent Strength Measures The Mark's Probable Effect On The Minds Of Ordinary Consumers At The Time Of The Mark's First Use, Which Entails A Primarily Factual Inquiry

A trademark's inherent (*i.e.*, conceptual) strength—its strength when it is first used—measures the degree to which the mark will signify in the minds of consumers the source of the goods to which it is attached. Inherent strength is considered as part of a broader inquiry into whether consumer confusion is likely. That ultimate likelihood-of-confusion issue is itself a mixed question in which the factual elements predominate.

1. Inherent strength is relevant to a likelihood of consumer confusion and therefore measures the mark's effect in the minds of such consumers

a. The "likelihood of confusion" standard central to trademark-infringement claims asks whether the defendant's allegedly infringing conduct "is likely to produce confusion in the minds of consumers about the origin of the goods or services in question." *KP Permanent Make-Up, Inc.* v. *Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004). The "crucial issue" is "whether there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question." *Savin Corp.* v. *Savin Grp.*, 391 F.3d 439, 456 (2d Cir. 2004) (citation omitted), cert. denied, 546 U.S. 822 (2005); see 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §§ 23:2 & n.1, 23.12 & n.1, at 420-421, 522-525 (5th ed. 2026); Restatement of Torts § 728 cmt. a, at 591 (1938); see also Restatement (Third) of Unfair Competition § 20, cmt. g, at 216 (1995) ("significant number").

To provide structure to that inquiry, the courts of appeals have adopted various multi-factor tests, which identify a range of considerations that serve as a "road map on how to reach a conclusion on the ultimate issue of 'likelihood of confusion.'" 3 McCarthy §§ 24:28, 24:30, at 905-908. "[A]ll" of those tests "owe their origin to the 1938 Restatement of Torts," which identified a "list of foundational factors" that formed "the basis for the various lists" later adopted by the circuits. *Id.* §§ 24:29 & n.1, 24:30, at 906-908.

The first Restatement emphasized that its own list was simply a "[non]exclusive catalogue of relevant factors" that "generally," First Restatement §§ 729 & cmt.

a, 731 & cmt. a, at 593, 601, "bear[] on th[e] issue" of "confusing similarity" to a protected trademark, an issue that turns on "the probable or actual reactions of purchasers," *id.* § 728 cmt. a, at 591. See *id.* § 717(1) and (2)(a), at 562 (defining trademark infringement). The Second Circuit cited that Restatement when it first articulated its own eight-factor test, which the court explained did "not exhaust the possibilities" because "still other variables [may need to be taken] into account" when considering whether consumer confusion is likely. *Polaroid Corp.* v. *Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir.) (citing First Restatement §§ 729-731), cert. denied, 368 U.S. 821 (1961).

The factors identified in the various multi-factor tests are "merely discrete aspects of a comprehensive analysis intended to achieve a practical evaluation of what consumers are likely to believe when they encounter the competing [trademark] in the marketplace." Third Restatement § 21 cmt. b, at 229. That "likelihood of confusion" must be "determined by the totality of the circumstances," so that "any factor that is likely to influence the impression conveyed to prospective purchasers by the actor's use of [a mark] is relevant." *Id.* § 21 cmt. a & m, at 227, 236; see *id.* § 21, at 226 (instructing that relevant considerations include "all the circumstances involved in the marketing of the respective goods or services").

b. Once each of the relevant factors has been evaluated, the factors must be "weighed and balanced one against the other." 3 McCarthy § 24:30, at 908. Ultimately, whether a likelihood of consumer confusion exists will "depend[] on the interplay of all [pertinent] factors," where "[t]he relative importance of any factor

* * * depends on the facts of the particular case." Third Restatement § 21 cmt. a, at 227.

The Second Circuit's jurisprudence reflects that understanding. The court of appeals has observed that its *Polaroid* factors are designed to "guide deliberation" into "whether there is a likelihood of confusion." *New York Stock Exch., Inc.* v. *New York, New York Hotel, LLC*, 293 F.3d 550, 555 (2d Cir. 2002). The court has long emphasized that no single "factor is determinative"; that "each must be considered in the context of all of the other factors"; and that "the ultimate conclusion" of "whether there is likelihood of confusion" must be reached "from a balance of these determinations." *Plus Prods.* v. *Plus Disc. Foods, Inc.*, 722 F.2d 999, 1004 (2d Cir. 1983) (citing cases); Pet. App. 5a (similar).

c. One of the relevant factors is trademark strength, which is "the degree to which [a mark] is associated by prospective purchasers with a particular source." Third Restatement § 21 cmt. i, at 233; see p. 7, *supra*. Inherent (or conceptual) strength is simply a mark's predicted strength at the time of its first use. See p. 8, *supra*. As with mark strength more generally, the inherent-strength inquiry assesses a mark's effect on "the mind of the consuming public" to judge the degree to which consumers will associate it with a particular source of goods. 1 McCarthy § 11:73, at 1156 (citation omitted). And like the overall likelihood-of-confusion inquiry (and like trademark tacking), the strength inquiry calls for the "[a]pplication of a test that relies upon an ordinary consumer's understanding of the impression that a mark conveys," *Hana Fin.*, 574 U.S. at 422.

2. Inherent strength entails a primarily factual inquiry

A determination of a trademark's inherent strength considers the circumstances that existed when the mark was first used. Those circumstances include (1) the mark's degree of inherent distinctiveness in light of the services or goods with which it is used and (2) the marketplace conditions that existed at that time of its first use. Because an assessment of inherent strength entails a primarily factual inquiry, inherent strength is properly analyzed at summary judgment in the same manner as other issues that a factfinder might resolve based on case-specific evidence.

a. The initial assessment of whether a particular mark has *any* inherent distinctiveness turns on whether "prospective purchasers are likely to perceive [the mark] as a designation that * * * identifies goods or services produced or sponsored by a particular person." Third Restatement § 13(a), at 104; see *id.* § 13 cmt. c, at 106 (explaining that for inherently distinctive marks, "prospective purchasers can be expected to view" or "perceive" the mark as indicating the source of a good or to "place primary emphasis on [the mark's] identifying" significance). That consumer-oriented analysis is fact-intensive and mark-specific. "[A] term that is in one category for a particular product may be in quite a different one for another," *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976), and may even be generic if the term has "enter[ed] [the] public discourse" and become a "part of our vocabulary," *Mattel, Inc.* v. *MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002), cert. denied, 537 U.S. 1171 (2003). The courts of appeals are thus uniform in treating a mark's proper classification among the five recognized categories of distinctiveness (see p. 5, *supra*) as a factual issue. 1 McCarthy § 11:3 & nn.1-2, at 969-970.

The *degree* to which an inherently distinctive mark will identify a particular source in the mind of consumers further depends on the relationship between the mark and the goods to which it is affixed. The source-identifying potential of a suggestive word mark (like "RISE") will depend in part on whether consumers perceive a close association between the mark and similar goods sold by other companies. If consumers have that perception, the mark's ability to identify a *particular* source will be limited.

This case illustrates that principle. In determining that the mark "RISE" was inherently weak, the court of appeals observed that the "mark suggests" "[c]offee's capacity to wake one up and lift one's energy." Pet. App. 57a. The court concluded, however, that "[t]he close associations between the word 'Rise' and coffee constituted a weakness of the mark under the trademark law," *id.* at 56a, because those associations diminished the likelihood that consumers would perceive the mark as identifying a *particular source* of coffee, see *id.* at 55a-57a.

b. The marketplace conditions that exist when a mark is first used can further affect its inherent strength. In this case, for instance, the court of appeals found that "RISE" had a limited ability to identify RiseandShine specifically as the source of its coffee product because, when the mark was first used, numerous other companies had already "use[d] * * * the term 'Rise' in the beverage market" "in the same way" "to allude to increased energy, particularly in the morning hours." Pet. App. 57a-58a. Based on the record evidence concerning pertinent marketplace practices at the time when Riseand-

Shine first used the "RISE" mark, the court thus drew a (factual) inference about the mark's source-identifying effect "in the eyes of the purchasing public." *Id.* at 51a (citation omitted).

c. The analysis that the Second Circuit used to assess the inherent strength of RiseandShine's mark bears little resemblance to the analysis that courts typically conduct in deciding pure questions of law, such as the meaning of disputed statutory provisions. See *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 385 (2024). The court of appeals' conclusions about the "strong logical association[ ] between 'Rise' and coffee," and the impact on consumer perceptions of other marks "in the beverage market," Pet. App. 55a, 57a, do not reflect the application of legal analysis or expertise. Rather, they represent the court's own fact-dependent assessment of ordinary consumers' experience and perceptions, based on record evidence of commercial practices that existed when RiseandShine first used the "RISE" mark.

To be sure, the inherent-strength inquiry has a legal *component*. Although the inquiry turns on ordinary consumers' perceptions, the *term* "inherent strength" and its relevance to a proper assessment of likely consumer confusion will typically be unfamiliar to jurors. Appropriate instructions therefore will be necessary to explain those concepts and guide the jury's consideration of relevant facts. Cf. *Hana Fin.*, 574 U.S. at 424 (explaining that, "insofar as petitioner is concerned that a jury may improperly apply the relevant legal standard [for trademark tacking], the solution is to craft careful jury instructions that make that standard clear"). But given the inherent-strength inquiry's focus on "the perspective of an ordinary purchaser or consumer," *id.* at 420, and the likelihood that resolution of inherent-strength controversies will "immerse courts in case-specific factual issues," *U.S. Bank*, 583 U.S. at 396, an assessment of a trademark's inherent strength involves the sort of predominately factual question for which the factfinder's determination should be given significant deference on appeal. For the same reasons, when a court at summary judgment determines whether a reasonable jury could rule for the nonmoving party, it should bear in mind the predominately factual nature of inherent-strength disputes and the jury's primary role in balancing the relevant factual considerations.

d. PepsiCo cites *Ornelas* v. *United States*, 517 U.S. 690 (1996), and *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), for the proposition that an inquiry can be predominately legal even if it "operat[es] from the perspective of an ordinary person." Br. in Opp. 36; see *id*. at 36-37. The Court in *Ornelas* held that "the ultimate questions of reasonable suspicion and probable cause," which involve an evaluation of relevant facts "from the standpoint of an objectively reasonable police officer," "should be reviewed *de novo*" on appeal. 517 U.S. at 691, 696. The *Santa Fe* Court held that "[w]hether a government activity violates the Establishment Clause is 'in large part a legal question,'" even though the inquiry at that time turned in part on "'whether an objective observer * * * would perceive [the challenged activity] as a state endorsement'" of religion, 530 U.S. at 308, 315 (citations omitted).

Those decisions are inapposite because each involved application of "a constitutional standard" for which there is "a strong presumption" of "*de novo* review." *Bufkin* v. *Collins*, 604 U.S. 369, 384 (2025). "In the constitutional realm," the "calculus changes" to favor *de novo* rather than deferential review because *de novo* review allows appellate courts to perform the important function of clarifying applicable constitutional standards. *U.S. Bank*, 583 U.S. at 396 n.4 (distinguishing First and Fourth Amendment decisions, including *Ornelas*, on this basis). Here, no such considerations warrant a departure from the principles discussed above.

3. The relationship between trademark strength and the overall likelihood-of-confusion analysis reinforces the predominately factual nature of the trademark-strength inquiry

PepsiCo argues (Br. in Opp. 37) that a trademark's "conceptual strength" is "distinguishable" from questions that are properly considered factual under *Hana Financial* because conceptual strength is simply one "subsidiary" factor in a "multifactor test" used to perform "the ultimate 'likelihood of confusion' determination," which "the Second Circuit and other circuits treat as a legal question." PepsiCo thus appears to argue (*ibid.*) that inherent strength is properly deemed a legal question because the overall likelihood-of-confusion determination depends on "a balancing test decided as a legal question." That contention lacks merit. The question of likely confusion, like that of trademark strength, is a predominately factual issue that should itself be adjudicated as a factual issue at summary judgment.

In 1938, long before the courts of appeals had developed multi-factor tests for evaluating likely confusion, it was understood that "[t]he issue of confusing similarity is an issue of fact as to the probable or actual reactions of purchasers." First Restatement § 728 cmt. a, at 591. The first Restatement therefore explained that the determination of likely confusion would be informed by the Restatement's list of "factors bearing on this issue," *ibid.*, not decided by courts as a matter of law. The various circuits' subsequent identification of their own lists of relevant factors—all derived from the 1938 Restatement, see p. 20, *supra*—did not alter the nature of the inquiry. The modern Restatement adheres to the view that "whether the defendant's use of a trademark creates a likelihood of confusion is properly regarded as a question of fact." Third Restatement § 21 cmt. m, at 236.

That conclusion flows directly from the analysis above, and from the Lanham Act's ultimate focus on whether the use of a purportedly infringing mark "is likely to produce confusion *in the minds of consumers* about the origin of the goods or services in question." *KP Permanent Make-Up, Inc.*, 543 U.S. at 117 (emphasis added). As the Court in *Hana Financial* observed, application of a standard that depends "upon an ordinary consumer's understanding of the impression that a mark conveys falls comfortably within the ken of a jury." 574 U.S. at 422.

The ultimate likelihood-of-confusion determination is predominately "a factual judgment" about the probable perceptions of ordinary consumers. *Hana Fin.*, 574 U.S. at 425 n.2. The multi-factor tests developed by the courts of appeals help to guide the inquiry by identifying and explaining relevant factors that ordinarily should be considered, weighed, and balanced. Although each circuit's *list* of relevant factors is properly characterized as a legal standard, the factors themselves ask for essentially factual conclusions about the circumstances of a particular case. The ultimate determination therefore entails "primarily * * * factual work": The factfinder "takes a raft of case-specific * * * facts, considers them as a whole, [and] balances them one against another" to draw a "'factual inference'" about likely consumer confusion. *U.S. Bank*, 583 U.S. at 396-397 (brackets, citation, and footnote omitted); see pp. 6-7, 21-22, *supra*.

The Second Circuit's contrary view (Pet. App. 4a, 23a-24a & n.2) is incorrect.[4] The primarily factual nature of the likelihood-of-confusion inquiry has become particularly clear since this Court's 2015 trademark decision in *Hana Financial*. "The clear majority of circuits" have correctly determined that the inquiry involves "an issue of fact," and only the Second, Sixth, and Federal Circuits have concluded otherwise. 3 McCarthy § 23:67, at 711; see *id.* § 23:73, at 718-727 (citing cases).

After this Court decided *Hana Financial*, the Second Circuit considered that decision's effect on its own jurisprudence. See *Car-Freshner Corp.* v. *American Covers, LLC*, 980 F.3d 314, 326 n.4 (2d Cir. 2020). But after observing that it had previously "considered likelihood of confusion to be a question of fact," the Second Circuit noted that it had since settled on the view that the issue is a "question of law," and the court "adhere[d] to th[at] view" notwithstanding *Hana Financial*. *Ibid.*; see Pet. App. 10a-11a (concluding that *Car-Freshner* fore-

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[4] In its summary-judgment opinion below, the court of appeals "reject[ed] RiseandShine's argument that the district court erred in treating the likelihood of confusion question as a matter of law," and the court cited post-*Hana Financial* Second Circuit decisions that have "continued to hold that the likelihood of confusion test is a question of law." Pet. App. 10a. In a footnote later in its opinion, however, the court stated that the likelihood-of-confusion issue "could be submitted to a jury if there were enough evidence for a reasonable jury to make the predicate findings to establish a likelihood of confusion." *Id.* at 11a n.2. The court did not acknowledge or attempt to explain the seeming contradiction between those two aspects of its opinion.

closed revisiting the question); *Souza* v. *Exotic Island Enters., Inc.*, 68 F.4th 99, 109 (2d Cir. 2023) (similar).[5]

C. The Predominately Factual Nature of The Inherent-Strength Inquiry Does Not Preclude Summary Judgment In Appropriate Cases

For the reasons stated above, the court of appeals erred in suggesting that a district court should treat inherent trademark strength as a question of law that the court itself must resolve. This Court's correction of that error, however, would not foreclose the court of appeals or district court from reconsidering on remand whether summary judgment is warranted in this case. Summary judgment is appropriate when the moving party shows that "there is no genuine dispute as to any material fact" and that the party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For at least three reasons, the predominately factual character of the inherent-strength inquiry does not preclude a Lanham Act plaintiff or defendant from satisfying that summary-judgment standard.

1. "By its very terms," the summary-judgment standard set forth in Rule 56(a) "provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). A "dispute about a material fact is 'genuine[]'" only "if the ev-

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[5] The Sixth Circuit has noted the existence of "uncertainty over [its] standard" in light of *Hana Financial*, but it has not considered whether to revise its jurisprudence. *Max Rack, Inc.* v. *Core Health & Fitness, LLC*, 40 F.4th 454, 464 (6th Cir. 2022). The Federal Circuit likewise has not yet considered the effect of *Hana Financial* on its likelihood-of-confusion precedent.

idence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Despite the predominately factual character of the inherent-strength issue, the summary-judgment record in a particular case may be such that no reasonable jury could resolve the issue in the nonmoving party's favor. Cf. *Hana Financial*, 574 U.S. at 423 ("If the facts warrant it, a judge may decide a tacking question on a motion for summary judgment or for judgment as a matter of law.").

2. The inherent-strength inquiry is simply one component of the overall trademark-strength analysis, which includes consideration of the mark's acquired (or "commercial") strength as well. Because a trademark's inherent strength reflects the mark's source-identifying potential at the time of its first use, its impact on overall strength may be diminished if substantial time has passed between the mark's first use and the defendant's allegedly infringing conduct. The descriptive mark "American Airlines," for instance, would have had no appreciable tendency to identify a particular source of air-transportation services when it was first used in 1934. But the mark's consistent use in commerce over the ensuing decades, in conjunction with the company's now iconic red-white-and-blue livery, makes that lack of inherent strength immaterial today. Conversely, an arbitrary or fanciful mark may initially appear to have considerable source-identifying potential, yet demonstrably fail over time to develop any appreciable customer-recognition value. 1 McCarthy § 11.80, at 1173; see Third Restatement § 21 cmt. i, at 233.

3. Even when a "genuine" factual dispute about overall trademark strength exists, such a dispute will foreclose summary judgment only if it is "material" to the ultimate determination as to likely consumer confusion.

See Fed. R. Civ. P. 56(a). Where other factors bearing on likelihood of confusion are sufficiently clear, summary judgment on that ultimate question may be appropriate despite a genuine dispute as to the strength of the plaintiff's trademark. Cases might arise, for example, in which the marks used by the plaintiff and defendant are so dissimilar that no reasonable juror could find a likelihood of consumer confusion, regardless of how strong the plaintiff's trademark was determined to be. Cf. Pet. App. 5a (identifying "the degree of similarity between the plaintiff's mark and the defendant's allegedly imitative use" as the second factor in the applicable likelihood-of-confusion test).

This case, however, provides no occasion for the Court to consider whether PepsiCo was entitled to summary judgment on the ultimate issue of likely consumer confusion. The question presented in the petition for certiorari instead focuses more narrowly on whether the court of appeals erred in treating a subsidiary aspect of the likelihood-of-confusion inquiry as a question of law. The Court therefore should correct the court of appeals' error, vacate the court's judgment, and remand the case for further proceedings.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
BRETT A. SHUMATE
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DANIEL TENNY
BEN LEWIS
Attorneys

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